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No. 09-1262

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IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

TALISMAN ENERGY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

This Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004), endorsed the reasoning of most of the judges who had interpreted the Alien Tort Statute ("ATS") in the quarter century after the Second Circuit's seminal opinion in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980). This Court held that the ATS was jurisdictional but that the Founders intended the federal courts to remedy violations of the law of nations without further Congressional action. *Sosa*, 542 U.S. at 724-25. The Eleventh Circuit's reliance on federal common law for determining the standards for aiding and abetting liability in ATS cases faithfully implements this Court's decision in *Sosa*.

The Second Circuit erred in applying international criminal law standards for such liability in ATS cases. Moreover, even if the Second Circuit was right to consult international standards, it employed a "purpose" standard that sharply deviates from well-established international standards. Since Nuremberg, the international community has made it clear that private parties may be punished if they knowingly assist the perpetrators of genocide, war crimes and crimes against humanity. The Second Circuit's erroneous "purpose" standard imposes more stringent rules for civil aiding and abetting liability than international

law provides for criminal liability.[1] This Court should grant review to resolve the conflict between the Second and Eleventh Circuits and if international standards apply, to ensure that federal courts rigorously adhere to established international standards in ATS litigation.

These Plaintiffs do not seek to impose liability on Talisman Energy, Inc. ("Talisman") merely for "doing business" with Sudan. It is not merely "doing business" for a corporation to knowingly provide substantial assistance to further the commission of genocide, crimes against humanity or war crimes for profit.

Knowing that the joint venture's strategy for expanding oil exploration rested upon the commission of widespread atrocities in Sudan, Talisman joined willingly to exploit the concession's vast untapped oil reserves. As a joint venture partner, Talisman knowingly encouraged and contributed to the commission of systematic human rights violations and engaged in a wide-ranging campaign to cover them up. Only by supplanting well-established law was the Second Circuit able to affirm the dismissal of Plaintiffs' claims.

The issues raised in Plaintiffs' Petition have divided the lower federal courts since *Sosa*.

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[1] *See* Brief for International Commission of Jurists and the American Association for the International Commission of Jurists as *Amici Curiae* Supporting Petitioners at 2-3, No. 09-1262 (May 19, 2010) ("ICJ Br.").

Talisman's suggestion that this Court should wait to see if the Second Circuit's decision will gain further acceptance should be rejected. The Second Circuit was plainly wrong in its interpretation of international law, as Plaintiffs' *amici* demonstrate. A further delay will only postpone the essential clarification of these issues.

Moreover, Talisman's suggestion that the decisions below were "highly fact-bound," is misleading. Br. Opp'n. Cert. 5. The Second Circuit's decision is based entirely on its holding that the mental state for civil aiding and abetting under the ATS is "purpose." If that decision is reversed, the lower courts would have to review the summary judgment record under the proper standard. The evidence of Talisman's knowledge is indisputable. This Court need not consider or attempt to predict how the lower courts would address the issues remaining on remand.

This case is a timely and appropriate vehicle to resolve the issues presented in the Petition.

I. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH *SOSA*.

In *Sosa*, this Court held that federal common law supplies the cause of action in an ATS case. 542 U.S. at 724. *Sosa* concerned the issue of the primary conduct that violated the law of nations for ATS purposes. *Id.* It did not explicitly decide whether the scope or availability of complicity liability for the primary violation was governed by federal common

law or international standards. This issue now divides the Second and Eleventh Circuits.

The federal courts would ordinarily apply well-established federal common law principles in giving effect to a federal statute. *See* Brief for EarthRights International as *Amicus Curiae* Supporting Petitioners at 13, No. 09-1262 (May 20, 2010); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (relying on federal common law to fashion a rule of vicarious liability for Title VII claims).[2]

Footnote 20 of *Sosa* does not bear on this issue, much less resolve it. Footnote 20 raised the issue of which primary violations of customary international law require state action to be actionable under the ATS—no more, no less. The Second Circuit's reliance on footnote 20 to hold that international law provides the standard for aiding and abetting liability is

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[2] The U.S. Government has also expressed its disagreement with Talisman's view of the applicability of international law. Brief for the United States as *Amicus Curiae* at 5, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141 and 05-2326) ("Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law -- i.e., the law of the United States."); *see also* Brief for the United States as *Amicus Curiae* at 20, *Pfizer, Inc. v. Abdullahi et. al.*, 562 F.3d 163 (2d Cir. 2009) (No. 09-34) (referring to ATS claims as federal common law claims).

wrong. This Court did not address the issue much less reach such a holding.

Talisman advances a reading of the ATS that would render the statute a dead letter, which is precisely the argument this Court rejected in *Sosa*. *Sosa*, 542 U.S. at 714 (rejecting the argument that the ATS was "stillborn"). Neither this Court, nor Congress, has authorized such a draconian result. The *Sosa* Court approved the ATS as a means to provide a remedy for torts committed in violation of the law of nations. *Id.* at 729. Talisman's position is no less than a request for judicial repeal of the ATS, an appeal that is better addressed to Congress.

II. THE SECOND CIRCUIT'S "PURPOSE" STANDARD CONFLICTS WITH THE ELEVENTH CIRCUIT'S FEDERAL COMMON LAW STANDARD AND WITH ESTABLISHED INTERNATIONAL LAW.

Nothing in Talisman's Opposition refutes the existence of a split among the circuit and district courts. Not only does the Second Circuit's holding, that international law provides the standard for aiding and abetting liability, squarely conflict with the Eleventh Circuit's application of federal common law, but the Second and Eleventh Circuits are also split on the elements for aiding and abetting liability.

A. The Eleventh Circuit's Application of the Federal Common Law Knowledge Standard Is Precedential.

Talisman argues that the Eleventh Circuit's application of the federal common law knowledge standard for aiding and abetting liability in *Cabello v. Fernandez-Larios*, 402 F. 3d. 1148 (11th Cir. 2005), and its progeny, do not constitute binding authority because the jury instruction given in *Cabello* on this issue was not challenged on appeal. Br. Opp'n Cert. 12. Talisman relies on *Doe v. Drummond*, No 2:09-CV-01041, slip. op. at 16 (N.D. Ala. Nov. 9, 2009) (appeal pending), for this argument. Actually, the court in *Cabello* necessarily considered evidence under the aiding and abetting standard on appeal, 402 F.3d at 1158-59, to reject the defendant's third ground of appeal. *Id.* at 1151-52.

Cabello and its progeny are binding precedent in the Eleventh Circuit that federal common law supplies the standard for aiding and abetting liability in ATS cases and that the mental element for such liability is knowledge. 402 F. 3d at 1157-60.[3] Distinguishing dicta and holdings turns on whether

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[3] The application of federal common law in ATS cases was the law in the Eleventh Circuit before *Sosa* and nothing in *Sosa* would have caused the Eleventh Circuit to alter that precedent. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (giving judicial effect to ATS violations by "fashion[ing] domestic common law remedies").

the court's statement was necessary to the decision, not whether an issue was challenged on appeal.[4]

In *Cabello*, the court analyzed secondary liability standards for both aiding and abetting and conspiracy under federal common law. *Cabello*, 402 F. 3d at 1157-60 (relying on *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)). The Eleventh Circuit found that federal common law governs complicity liability, which covers both aiding and abetting and conspiracy. It did not find that international law was relevant to its analysis or holding. Thus, the court's reliance on federal common law is precedential.

The Eleventh Circuit has continued to apply federal common law to the issue of aiding and abetting liability in ATS cases,[5] which plainly and inescapably conflicts with the Second Circuit's rejection of federal common law in favor of what it erroneously believed was the international law standard. Indeed, even the Second Circuit and the district court recognized that their decisions were in

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[4] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (distinguishing "mere obiter dicta" from the well-established rationale of earlier decisions and finding that "it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

[5] *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005).

conflict with the Eleventh Circuit.[6] Only Talisman appears to deny this.

B. Customary International Law Requires Knowledge, Not "Purpose," for Aiding and Abetting Liability.

The customary international law standard for criminal aiding and abetting liability is knowledge. Brief of International Law Scholars as *Amici Curiae* Supporting Petitioners, No. 09-1262 (Apr. 30, 2010) ("Int'l Law Scholars Br."). The International Law Commission's Articles on State Responsibility does not change this standard,[7] nor does the Rome Statute, which as Amicus Ambassador Scheffer has emphasized, does not supersede customary international law with its ambiguous uninterpreted *mens rea* standard.[8]

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[6] Pet. A-32 n. 11; Pet B-61.

[7] The principles of state responsibility are irrelevant to Talisman's liability in tort since Article 58 reserves "any question of the individual responsibility under international law . . . ." Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No 10, art. 58, UN Doc. A/56/10 (2001).

[8] *See* Brief for David Scheffer as *Amicus Curiae* Supporting Petitioners, at 5-15, No. 09-1262 (May 20, 2010) ("However, if anyone claimed we were writing customary international law on aiding and abetting liability in Article 25(c)(3), they would have been laughed out of the room."); Pet. 32-33.

The *mens rea* for aiding and abetting in the post-World War II prosecutions of Nazi war criminals was knowledge, not purpose. *Id.* at 5-12. Talisman argues that the defendants' high level of culpability in the *Zyklon B* case signals that a higher standard of intent was present,[9] but a defendant's actual level of culpability does not alter the applicable legal standard. The knowledge standard has been consistently applied by international tribunals, including the ICTY, which is required to apply customary international law. Talisman has no real answer to the *amicus* briefs before this Court on this issue.

There is no doubt that the customary international law standard governing ICTY cases is knowledge. *Id.* at 12-15. Talisman, selectively quotes portions of the ICTY's decisions in *Prosecutor v. Tadic*, Case No. IT-94-1-A, (July 15, 1999), and *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, (Feb. 25, 2004), to argue that the ICTY has equivocated on this standard. Br. Opp'n Cert. at 17-18.[10] These

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[9] Br. Opp'n Cert. 18-19; *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8 1946).

[10] The full text of the *Tadic* decision clearly shows the standard is knowledge. *See Tadic*, Case No. IT-94-1-A, at ¶ 229. Moreover, the ICTY has repeatedly applied this standard. *See, e.g., Prosecutor v. Blagoje Simic*, Case No. IT-95-9-A, ¶ 86 (Nov. 28, 2006) (citing cases) ("The requisite *mens rea* for aiding and abetting is knowledge

decisions apply the knowledge standard and there is no contrary authority, or any ICTY decision applying the Second Circuit's "purpose" standard. Indeed, the *Talisman* decision has given false hope to alleged war criminals in ICTY proceedings and would undermine U.S. efforts to seek justice against a wide range of international law violators.[11]

Thus, under *Sosa*, there is simply no basis for U.S. courts to formulate a new international law "purpose" standard that has never been applied by any international or domestic court.

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that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator."). *See also* ICJ Br., at 8-10.

[11] In response to an ICTY defendant's brief relying on *Talisman*'s interpretation of aiding and abetting liability under international law, the ICTY Prosecutor has submitted a 462-page, 82-document Book of Authorities as well as a comprehensive brief rebutting the defendant's claims for a purpose standard under customary international law. *See Prosecutor v. Sainovic et al.*, Case No. IT-05-87-A, Notice of Filing of Public Redacted Version of Prosecution Response to General Ojdanic's Amended Appeal Brief, ¶ 249-94 (Feb. 12, 2010); *see generally Prosecutor v. Sainovic et al.*, Case No. IT-05-87-A, Book of Authorities to Prosecution Response to General Ojdanic's Amended Appeal Brief (Jan. 15, 2010).

III. PLAINTIFFS' CLAIMS WOULD NOT FAIL ON REMAND UNDER THE CORRECT KNOWLEDGE STANDARD.

Talisman's contention that Plaintiffs claims would fail under the knowledge standard is wrong and irrelevant in this context. The Second Circuit's entire analysis of the evidence below is based on its "purpose" standard.[12] On remand, the lower court would have to reassess the evidence of Talisman's knowledge and substantial assistance based upon the correct legal standard.

Plaintiffs submitted evidence that Talisman management was informed on multiple occasions that the joint venture depended upon the Sudanese military for security and that the military engaged in systematic attacks against the local civilian population to create a buffer zone as part of the *joint venture's* security strategy.[13] Plaintiffs presented

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[12] "It is therefore not enough for Plaintiffs to establish Talisman's complicity in depopulating areas in or around the Heglig and Unity camps; Plaintiffs must establish that Talisman acted with the purpose to assist the Government's violations of customary international law." Pet. A-57.

[13] Plaintiffs have identified some of this evidence in their petition. Pet. 6-10. *See* J.A. 003132-33 (Talisman Energy Sudan Steering Committee authorizes use of joint venture airstrips to base helicopter gunships despite knowledge of widespread civilian attacks); J.A. 0031322-33 (Talisman authorizes use of airstrips to base helicopter

irrefutable evidence of Talisman's knowledge that the Sudanese military used joint venture air strips to attack civilian villages. In 2000, the Canadian Government sent an official Assessment Team to Sudan to investigate allegations of systematic human rights violations in the joint venture's oil concession.[14] The Canadian Assessment Team's report concluded that Sudanese military aircraft based at joint venture airstrips conducted attacks against civilian villages within the oil concession.[15] Talisman's own internal reports confirmed these findings,[16] yet Talisman actively concealed these findings and orchestrated a campaign to publicly deny them.[17]

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gunships despite knowledge of widespread civilian attacks). Plaintiffs are limited here by space constraints but could add many more citations.

[14] "An Assessment Mission was agreed on, mandated to: (a) independently investigate human rights violations . . . , and (b) to investigate and report on the alleged link between oil development and human rights violations, particularly in respect of the forced removal of populations around the oil fields and oil related development." J.A. 002219.

[15] J.A. 002282-83.

[16] J.A. 010222-41.

[17] J.A. 010219 (Talisman executive orders internal human rights report to be revised to show no displacement of civilians due to oil exploration); J.A. 012667 (revised report attributes displacement to inter-

The lower court's observation that none of Talisman's actions were "inherently criminal" clearly conflicts with the civil law of aiding and abetting torts. Pet. A-49. Plaintiffs produced ample evidence that Talisman Energy provided substantial assistance to joint venture security forces knowing that those forces engaged in systematic human rights violations on behalf of the joint venture partners.

Plaintiffs also produced sufficient evidence to support their conspiracy claims. The district court did not reject Plaintiffs' conspiracy claims for lack of evidence. Pet. B 56-63. Instead, the court claimed that Plaintiffs had somehow dropped these claims even though Plaintiffs have *always* asserted them. The Second Circuit specifically addressed joint criminal enterprise liability in its opinion. Pet. A 46-48. Plaintiffs did not allege that Talisman committed the *inchoate* crime of conspiracy, but that Talisman is civilly liable as a conspirator for these *torts* in violation of the law of nations. *See Cabello*, 402 F.3d at 1159. If this Court agrees with the Eleventh Circuit, it is clear that Plaintiffs have produced sufficient evidence of federal common law conspiracy to have a jury decide this issue.

Talisman's argument that petitioners have failed to offer admissible evidence of causation is equally without merit. The district court found that it is uncontested "that the Government's military attacks on civilians in undefended villages

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tribal fighting).

constitutes war crimes." Pet. B-77. All Plaintiffs must prove is that they were injured in the course of indiscriminate military attacks. *See Prosecutor v. Galic*, Case No. IT-98-29-T, ¶ 57 (Dec. 5, 2003). In any event, neither the district court nor the Second Circuit based their decisions on the causation issue. This issue would also have to be considered on remand if the Second Circuit's "purpose" holding is overturned.

CONCLUSION

For all of these reasons, the Petition should be granted.

Dated: July 20, 2010

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